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Supreme Court, U.S.
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In the Supreme Court of the United States

Michael J. Carolan, Pro se,
Petitioner,

v.

Cardiff University and The University of Wales,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. In a case with alternative bases of jurisdiction premised on diversity and a federal question, is a burden shifting approach, which requires a defendant to name a state in which it is subject to suit, an appropriate application of Federal Rule of Civil Procedure 4(k)(2), when otherwise a Plaintiff would be required to bring suit in all fifty states to establish that a foreign defendant is not subject to suit in any court of general jurisdiction before the court would allow the assertion of jurisdiction based on nationwide contacts for claims arising under federal law, and is any decision as to venue or personal jurisdiction based on the federal question proper when the alternative basis of subject matter jurisdiction is used and hypothetical federal question jurisdiction is applied to conduct the due process analysis despite the plaintiff being prevented from presenting the relevant jurisdictional contacts for the nation as a whole instead of merely the contacts with a single state?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner states that he has no parent companies or nonwholly owned subsidiaries.

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OPINIONS BELOW

The opinion (Memorandum)of the Ninth Circuit Court of Appeals filed August 16,2004 (App., infra Page XVIII.) is not reported.

The opinion of the Western District of Washington, dismissing for lack of personal jurisdiction, dated June 9th 2003 (App., infra Page V.) is not reported.

The Opinion of the Western District of Washington, granting the defendants' motion for costs, dated September 8, 2003 (App., infra Page XV.) is not reported.

JURISDICTION

The Court of Appeals judgment was entered on August 16th 2004. A timely petition for rehearing and rehearing en banc was denied on December 3, 2004 (App., infra Page XXII.). The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATEMENT

This case raises important issues concerning the exercise of personal jurisdiction over a foreign defendant and the balancing of due process burdens between plaintiff and defendant under Federal Rule of Civil Procedure 4(k)(2), hereafter "Rule 4(k)(2)".

The case raises due process issues specifically in terms of precluding opportunities for a plaintiff to properly assert all possible basis of jurisdiction when the court engages in hypothetical jurisdiction and such hypothetical action precludes the resolving of relevant evidentiary matters in dispute which may bear on the determination of the jurisdictional question and ultimately the outcome of the case itself.

1. History and Background of Enactment of Federal Rule 4(k)(2).

Rule 4(k)(2) was enacted by congress to correct a gap in the enforcement of federal law. Advisory Committee's note, 1993 Amendments, Fed.R.Civ.P.4, Subdivision (k). The enactment of the rule was intended as a response to the Supreme Court's suggestion in Omni Capital. Id.; (Omni Capital Int'l v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 108 S. Ct. 404, 98 L.Ed. 2d 415 (1987).)

> **Federal Rule of Civil Procedure 4(k)(2) states:**
> "If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state."

Rule 4(k)(2) was intended to fill the gap under the former rule where a non-resident defendant had sufficient contacts with the U.S. as a whole to satisfy the due

process considerations of U.S. law, but lacked sufficient contacts with any single state to support jurisdiction. Advisory Committee's Note, 1993 Amendments, Fed.R.Civ.P.4, Subdivision (k). In such cases, the defendant was shielded from the enforcement of federal law by the fortuity of a favorable limitation on the power of state courts. Id.

Simply stated, for jurisdiction under 4(k)(2), the jurisdictional limit would be those determined under the 5th Amendment not the 14th Amendment. Hence, the relevant jurisdictional contacts would be with the nation as a whole instead of with an individual state.

Proper interpretation of the rule is important in terms of circuit consistency and implementation of congressional intent. The proper application of the rule reduces the inefficient practice of shifting all the burden of production on the plaintiff and reduces the likelihood that a court might engage in hypothetical jurisdiction in either denying the plaintiff jurisdiction or premising jurisdiction on 4(k)(2) when in fact there is one of the 50 courts of general jurisdiction in which the plaintiff can bring suit.

The proper application of the rule fills the gap congress intended to remedy. When a claim is brought as a federal question and there is no service provision, the rule provides for jurisdiction and a legal venue when a defendant lacks sufficient contacts with any single state, yet has the requisite nationwide contacts.

The misapplication of 4(k)(2) will almost certainly defeat the situations the rule was intended to avoid, not providing a venue where a defendant has contacts with the nation as a whole but insufficient contacts with any one state. Misapplication of the rule also leaves in place the inefficient and burdensome requirement that a

plaintiff bring suit in all 50 states before triggering 4(k)(2) and the required evaluation of jurisdictional contacts with the nation as a whole.

Hence, any difference as to the use of Rule 4 (k)(2) is significant enough to change the outcome of the litigation based on how the rule is applied. Diversity among the circuits as to the application of a federal rule of civil procedure and the possibility that its differing implementation may alter the outcome of claims depending on the interpretation of the rule and increases the likelihood of undesirable forum shopping in our courts.

2. The Ninth Circuit Court of Appeal's decision.

The Ninth Circuit, in affirming the District Court's Dismissal for lack of personal jurisdiction, failed to employ a burden shifting approach that other circuits utilize to give life to Rule 4(k)(2).

Petitioner, Carolan, raised the issue of Rule 4(k)(2)'s use in a timely manner after the basis of subject matter jurisdiction came into question. In motions of opposition to dismissal and on appeal, Carolan asserted the Foreign Sovereign Immunities Act (*Foreign Sovereign Immunities Act of 1976, 28 U.S.C.S. § 1602 et seq., Hereafter "FSIA"*) as a basis of jurisdiction. Carolan requested leave to amend the complaint to assert FSIA as a basis of Federal Question jurisdiction. Carolan also requested a stay of dismissal for jurisdictional discovery. These requests were denied.

The Ninth Circuit, without clarifying the basis of their own subject jurisdiction, cut down the application of Rule 4(k)(2). Engaging in hypothetical jurisdiction, the court stated that it need not consider whether the FSIA applies to the defendants because "an exercise of

jurisdiction under the FSIA must still comport with due process.". (See Memorandum, Ninth Circuit, August 16,2004 page 3,(App., infra Page at page XX)).

Carolan believes that Ninth Circuit's decision based on the hypothetical examination of federal question jurisdiction and the application of Rule 4(k)(2) is in error. Given the difference and uncertainty in application of use of this rule, Carolan Petitions this court for clarification of the issue of burden shifting of production under Rule 4(k)(2).

2. Reasons for Granting the Petition.

A. There is a significant conflict among the circuits as to the application of Rule 4(k)(2) and only the Supreme Court can resolve this issue.

There is conflict among the circuits in the application of Rule 4(k)(2) and the difference in application is significant enough to change the outcome of the same case depending on which circuit it is filed in.

Although they employ different approaches, both the first and seventh Circuits treat the prima facie invocation of applicability of 4(k)(2) as a burden shifting provision as to whether a defendant is subject to suit in one of the courts of general jurisdiction.

i. The First circuit uses a tripartite showing to trigger the burden shift under Rule 4(k)(2).

The prima facie case for the applicability of the Rule 4(k)(2) includes a tripartite showing: (1) that the claim asserted arises under federal law, (2) that personal jurisdiction is not available under any any situation-specific federal statute, and (3) that the putative defendant's contacts with the nation as a whole suffice to satisfy the applicable constitutional requirements. The

plaintiff must also certify that the based on the information that is readily available to him, that the defendant is not subject to suit in the courts of general jurisdiction of any state. United States v. Swiss American Bank., Ltd., 191 F.3d 30,41 (1st Cir. 1999). Hereafter "Swiss Bank".

When this prima facie case is met, the burden shifts to the defendant to produce evidence that would show either that he is subject to suit in one or more specific states or that his contacts with the United States as a whole are constitutionally insufficient for the assertion of jurisdiction. Id. at 41-42.

ii. The Seventh circuit applies a more direct approach.

In the interest of avoiding decisions founded on hypothetical jurisdiction and the sensible allocation of burdens, the Seventh Circuit requires a defendant who wants to preclude the use of 4(k)(2) to name some other state in which the suit could proceed. See: ISI International, Inc., v. Borden Ladner Gervais LLP., 256 F.3d 548, 552 (7th Cir. 2001). If the Defendant contends that he cannot be sued in the forum state and refuses to identify any other state where suit is possible, then the federal court is entitled to use Rule 4(k)(2) to assert personal jurisdiction. Id.

ii. The Fourth Circuit:

The Fourth Circuit acknowledges the existence of the First Circuit's prima facie approach for triggering the use of Rule 4(k)(2). Base Metal Trading, Ltd., v. Novokuznetsky Aluminum., 283 F.3d 208, 215 (4th Cir. 2002). But the Fourth Circuit seems to limit the burden shifting approach by a strict interpretation of the prima

facie requirement that the defendant is "not subject to the jurisdiction of the courts of general jurisdiction of any state", (The "negation requirement").

In Base Metal, such a strict interpretation of satisfying the second "Swiss Bank" requirement, where the plaintiff was simultaneously trying to assert personal jurisdiction in Maryland while at the same time as trying to trigger the use of Rule 4(k)(2), defeated altogether the plaintiff's attempt to assert jurisdiction based on nationwide contacts of the defendant. Id.

What is interesting about Base Metal, is the reasoning of the court's decision to stop the use of Rule 4(k)(2), given the pending attempt to assert jurisdiction in Maryland. The decision appeared not to be premised on a basis of comity per se, but more in terms of lis alibi pendens, and the desire not to deprive a sister circuit the opportunity to decide a question before them. Base Metal. at 215. This practice completely ignores the purpose of Rule 4(k)(2).

The lower Court stated it more objectively " any finding that no state court had jurisdiction "would usurp the opportunity for sister federal courts to exercise jurisdiction which they may decide they have."". Base Metal. at 212.

Hence the Fourth Circuit recognizes the burden shifting approach but their application defeats its purpose in trying to more efficiently assign the burdens under Rule 4(k)(2).

iv. The Third and Ninth Circuits:

Courts in the Third and Ninth Circuits have not adopted the burden shifting approach of the First and Seventh Circuits. The Third and Ninth Circuits inefficiently and burdensomely place the entire burden on

the plaintiff to come forward with evidence of the defendant's overall contacts with the nation as a whole, evidence that the defendant is more likely to have and more easily produce. See BP Solar, Ltd. v. Formosa Chemical & Fibre Corp., 229 F.3d 254, 259 (3rd Cir. 2000); Also see Nichols v. Harich Tahoe Development.,1995 US Dist LEXIS 21749, *13 (N D Cal).

B. This uncertainty as to application of Rule 4(k)(2) is recurring and an issue of great importance:

i. Applications of Rule 4(k)(2) that utilize a burden shifting approach effectuate the intent and purpose of the rule by reducing insurmountable, unrealistic, and inefficient burdens of production placed on a plaintiff trying to assert jurisdiction over a foreign defendant.

The First Circuit has been at the lead in interpreting that Fed. R. Civ. P. 4(k)(2) may require a burden shifting approach to effectuate the use of the Rule. The First and the Seventh Circuits' actions are in line with the purpose that the Supreme Court and congress intended for the rule: when a defendant was not subject to suit in any particular state but had to sufficient nationwide contacts, the plaintiff would not have to prove that a defendant was not subject to jurisdiction in all of the 50 states before the court would undertake the constitutional analysis at the national level. The First Circuit adopted a burden shifting approach to Rule 4(k)(2) in "Swiss Bank",. United States v. Swiss American Bank., Ltd., 191 F.3d 30,41 (1st Cir. 1999).

The Court made clear that when a plaintiff makes a prima facie case of jurisdiction based on Rule 4(k)(2), the burden shifts to the defendant to produce evidence that shows one or more specific states in which it would be subject to suit or that its contacts with the United States are constitutionally insufficient. Id..

The Seventh Circuit would later follow the lead of the first circuit and clarify the allocation of burdens under Rule 4(k)(2) in that " A defendant who wants to preclude use of Rule 4(k)(2) has only to name some other state in which the suit could proceed.". ISI International, Inc., v. Borden Ladner Gervais LLP., 256 F.3d 548, 552 (7th Cir. 2001).

From the Seventh Circuit also see Central States Pension Fund v. Reimer Express World Corp., 230 F.3d 934,942 (7th Cir. 2000); Noting purpose of Rule 4(k)(2) from Fed.R.Civ.P.4, Advisory Committee's note, that rule was intended to fill the jurisdictional gap as suggested by the Supreme Court in Omni Capital Int'l v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 108 S. Ct. 404, 98 L.Ed. 2d 415 (1987).

The burden shifting jurisdiction analysis used by the First and Seventh Circuit's triggers an efficient jurisdictional inquiry. This inquiry is efficient in terms of eliminating the need for the plaintiff to prove that the defendant is not subject to jurisdiction of all 50 states before the court analyzes the defendant's contacts with the nation as a whole under Rule 4(k)(2).

The inefficiency resulting from the failure to use a burden shifting analysis of 4(k)(2) is especially evident when there is an pending attempt to assert jurisdiction as the same time as a party tries to meet the "no state court has jurisdiction" requirement of Rule 4(k)(2).

When properly applied, the burden shifting analysis for rule 4(k)(2) should also overcome the situation in which the defendant fails to name a state court that has jurisdiction over him at the same time a plaintiff's claim of jurisdiction is before another circuit. This problem arose in the Fourth Circuit where the court recognized personal jurisdiction under 4(k)(2) as set out in the 1st Circuit by in "Swiss Bank", but didn't follow through with that courts burden shifting process. Base Metal Trading, Ltd., v. Novokuznetsky Aluminum., 283 F.3d 208, 215 (4th Cir. 2002).

In Base Metal, the Fourth circuit declined to trigger the burden shifting approach when it would require them to usurp a "question currently before at least one of our sister circuits". Id.

Although, this Fourth Circuit case may be fact specific as to whether the plaintiff made the prima facie case for the use of "Swiss Bank" burden shifting or even Rule 4(k)(2) itself, the case highlights in part the inefficiency that the rule was intended to eliminate where a plaintiff's bears an impossible or "catch-22" burden in proving that the defendant is not subject to jurisdiction in any state court. The knowledge as to what state or no states that a defendant has contacts in is information that is more readily and efficiently produced by a defendant than the plaintiff.

A court which allows a defendant to avoid jurisdiction under 4(k)(2) by failing to identify a jurisdiction in which they can be sued and then fails to trigger the use of the national contacts analysis is clearly setting up a inefficient system which requires a plaintiff to endure the costs of bearing the burden of production for defenses that the defendant may or might not plead: such as they are only subject to jurisdiction in one of the

50 states and the plaintiff need only continue to bring his claim in the first 49 until we reach the one the defendant is amenable to jurisdiction in. (See Richard A. Posner, An Economic Approach to the Law of Evidence, 51 Stan L Rev 1477,1502-1503(1999); For a brief discussion on economic rationale for shifting burden of production in cases of defenses.

ii. The burden shifting application of Rule 4(k)(2) decreases the need for a court to engage in hypothetical jurisdiction.

The Seventh and First Circuits' application and burden shifting analysis for Rule 4(k)(2) not only implements the desired procedure that the Supreme Court suggested to fill a jurisdictional gap, but is a more efficient method of allocation of burden production between a plaintiff and defendant which also reduces the likelihood or need for a court to engage in hypothetical jurisdiction.

It is the duty of the court to see that the jurisdiction of the District Court which is defined and limited by statute is not exceeded. Sumner v. Mata., 449 U.S. 539, 548; 101 S.Ct.764,770; 66 L.Ed.2d 722, 732; (1981).

The substantive law is the law that identifies which facts are material, that is, it is the substantive law's identification of which facts are critical and which facts are irrelevant. . Anderson v. Liberty Lobby, Inc., 477 U.S. 242,248; 106 S.Ct. 2505,2510; 91L.Ed. 202, 211; (1986). The importance of determining the proper basis of subject matter jurisdiction is critical since the validity of a order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties. Insurance Corp. of Ireland v. Compagnie Des

Bauxites de Guinee., 456 U.S. 694, 702; 72 L.Ed. 2d 492, 301;102 S. Ct. 2099, 2104 (1982).

A federal court may not hypothesize subject-matter jurisdiction for the purpose of deciding the merits of a case. Ruhrgas AG., v. Marathon Oil Co., 526 U.S. 574,577; 119 S. Ct. 1563, 1567; 143 L.Ed.2d 760; 767, (1999). Although there is no unyielding jurisdictional hierarchy, a federal court customarily first resolves doubts about its jurisdiction over the subject matter, but there are circumstances in which a district court may appropriately first resolve doubts about personal jurisdiction. Id. at 578.

Federal courts are courts of limited jurisdiction . The character of the controversies over which federal judicial authority may be extended are delineated in Art. III, Section 2, Cl.1 of the Constitution. See Insurance Corp. of Ireland v. Compagnie Des Bauxites de Guinee., 456 U.S. 694, 702; 72 L.Ed. 2d 492, 301;102 S. Ct. 2099, 2104 (1982).

In States bound together by a constitution and subject to the Fourteenth Amendment, great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact. McDonald v. Mabee., 243 U.S. 90, 91; 37 S.Ct.343, 61 L.Ed. 608,609. (1917).

Burden shifting applications of Rule 4(k)(2), allow the court to conduct a jurisdictional analysis under the relevant set of facts under the proper substantive law while still maintaining the ultimate burden of persuasion on the plaintiff. This approach eliminates the need for the court to engage in needless hypothetical jurisdiction evaluations required in the attempt to finally trigger the application of Rule 4(k)(2).

In cases such as the Petitioner's, the avoidance of hypothetical (subject matter jurisdiction) is especially important since the action involves a foreign instrumentality. Subject matter jurisdiction is a threshold matter for a federal district court in any action against a foreign sovereign or its agency or instrumentality. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 493-94, 76 L.Ed. 2d 81, 103S.Ct.1962 (1983).

iii. The burden shifting application of Rule 4(k)(2) provides a venue for plaintiff's in the context of modern and international business practices.

With the continuing rise of international trade and internet based business that no longer maintain traditional contacts with a forum, the Burden shifting approach allows our courts to provide a forum similar to that which other international judicial systems provide, without sacrificing our unique fundamental due process protections afforded to all defendant called before our courts.

The burden shifting approach is more compatible with asserting personal jurisdiction in today's modern business environment. The application of 4(k)(2), triggered by burden shifting, is compatible with other nations' assertion of jurisdiction over non-residents and yet still less obtrusive. For example, Despite no finding of intentional harm in the forum, France asserted Jurisdiction over U.S. based Yahoo! for hosting a web site which that was accessible in France and on which nazi memorabilia was auctioned for sale. See "Symposium: Personal Jurisdiction in the Internet Age; Wendy Perdue, 98 Nw. U.L.Rev.455,462-64, (2004.) The French Civil code also grants French courts jurisdiction over all disputes in which the plaintiff is

French, regardless of whether the defendant or the dispute has any connection with France. Id. at 464.

iv. The burden shifting application of Rule 4(k)(2) still provides defendants the protections of the due process.

Even with the shifting of the burden of production under 4(k)(2), the defendant is still protected by the 5th amendment and the requirement that the plaintiff still must ultimately establish that the Defendant has nation wide contacts sufficient not to offend due process.

Certainly, foreign defendant are still also protected by judicial safeguards inherent in our common law system such as a forum non conveniens dismissal.

4. This case clearly represents the widespread uncertainty and difference in application among the circuits as to Rule 4(k)(2).

This case makes a clear prima facie case for application of rule 4(k)(2) and the argument that the jurisdictional decision would differ if the burden shifting provision of the First or Seventh Circuit was utilized.

In particular the case shows the results of the failure to utilize the burden shifting provisions. The case has already been brought in district courts of two States, where the defendants have had some contacts in each. Although not representing the widespread uncertainty as to the rule, the case clearly shows the insurmountable burdens and inefficiency that a plaintiff encounters when the burden shifting analysis is not employed. The case shows how the inefficiency in requiring the plaintiff to produce evidence of contacts and defenses that is information that the defendant is more easily and efficiently able to provide.

The case also shows the resulting use of hypothetical jurisdiction when 4(k)(2) is not employed and the undesirable result of failure to provide a jurisdiction method to fill a gap present in the context of modern and international business practices based on nationwide contacts.

Further and more specific presentation of legal differences of this case from those of other circuits and why it represents the uncertainty in application of Rule 4(k)(2), are contained below in the argument as to why the Ninth Circuit's decision is incorrect.

5. The Ninth Circuit's Decision is incorrect:

A. The Court erred in not utilizing a burden shifting approach. The Ninth Circuit and third Circuit do not use the Burden Shifting approach to Rule 4(k)(2).

1. The court incorrectly used hypothetical jurisdiction to reach its decision as to personal jurisdiction.

The Ninth Circuits Standard of review for the existence of subject matter jurisdiction under the Foreign Sovereign Immunities Act was a question of law reviewed de novo. Alder v. Federal Republic of Nigeria., 219 F.3d 869,874 (9th Cir. 2000). Subject matter jurisdiction is a threshold matter for a federal district court in any action against a foreign sovereign or its agency or instrumentality. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 493-94, 76 L.Ed. 2d 81, 103S.Ct.1962 (1983).

The Ninth Circuit, premised its dismissal and failure to evaluate personal jurisdiction under FSIA on

the basis that such an exercise of jurisdiction must still comport with due process. (See Memorandum, Ninth Circuit, August 16,2004 page 3,(App., infra Page at page XX)).The court stated that the jurisdictional analysis under state and federal law are the same. (Id. at page 2, App., infra page XIX.).

Clearly, the jurisdiction analysis under diversity jurisdiction examining the defendants' contacts with Washington state differs from the analysis of the contacts with the nation as a whole under Rule 4 (k)(2). If we must: the personal jurisdiction inquiry in federal question cases differs from the inquiry in diversity cases. United States v. Swiss American Bank, Ltd., 274 F.3d 610,618, (1st Cir. 2001).

Hypothetically basing jurisdiction in federal question without allowing discovery or evaluating the nationwide contacts of the defendants under Rule 4(k)(2) the court denied the opportunity to assert personal jurisdiction over the defendants.

2. The outcome of the case would clearly differ if the Ninth Circuit utilized the Burden shifting approach of the 1st Circuit.

The Ninth Circuit failed to conduct this analysis despite Carolan making the prima facie case for the use of the Rule 4(k)(2) jurisdictional analysis. The prima facie case for the applicability of the Rule 4(k)(2) includes a tripartite showing: (1) that the claim asserted arises under federal law, (2) that personal jurisdiction is not available under any any situation-specific federal statute, and (3) that the putative defendant's contacts with the nation as a whole suffice to satisfy the applicable constitutional requirements. The plaintiff must also certify that the based on the information that is readily available to him,

that the defendant is not subject to suit in the courts of general jurisdiction of any state. United States v. Swiss American Bank., Ltd., 191 F.3d 30,41 (1st Cir. 1999).)

i. **The first requirement of the burden shifting application is that the claim arises under federal law:**

Even if the court were to ignore plaintiff's request to amend complaint to assert FSIA as a basis for jurisdiction, Federal Courts may raise the issue of 4(k)(2) on their own. ISI International, Inc., v. Borden Ladner Gervais LLP., 256 F.3d 548, 551-552 (7th Cir. 2001); Federal Courts are entitled to apply the right body of law, whether the parties name it or not. See: Kamen v. Kemper Financial Services., Inc., 500 U.S. 90, 111 S. Ct. 1711, 114 L.Ed.2d 152. (1991).

The Defendants claim that they are a instrument of a foreign state.[1] But did not request FSIA immunity.

Under 28 USC §1330, the district courts shall have original jurisdiction of any non-jury civil action against a

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[1] Although never disclosed in prior litigation the Defendants now state that they are an instrumentality of a foreign state. Defendants claimed the right of sixty days to respond as a sovereign body under 28 USC §1608 (d) and stated in pleading that they are a foreign instrument). (Foreign Sovereign Immunities Act of 1976, 28 U.S.C.S. § 1602 et seq.) The defendants invoked 28 USC § 1610(d), indicating that they were a instrumentality of a foreign state (Defn. reply in support of motion for enlargement of time, April 9th, 2003 page 4, line 1-4). Defendants stated that they were a "foreign government affiliated entity". (Defn. motion for enlargement of time, March 27th, 2003, page 4 lines 11-14.). The universities requested, and the district court afforded them, the privileges only available to a sovereign.

foreign state in which the state is not entitled to immunity.[2]

When a district court enters an order that changes the contours of the state court action or has a conclusive effect, regardless if the issue of law was jurisdictional or substantive, the parties rights have been altered in a manner that the state court cannot revisit. *See* Aquamar S.A., v. Del Monte Fresh Produce N.A., Inc., 179 F.3d 1279, 1286 (11th Cir.1999).

The Universities use of *28 USC §1608 (d)* to avoid answering the complaint precluded any motion by plaintiff to stop removal from state court.

FSIA confers subject matter jurisdiction upon district courts in nonjury civil actions where the foreign state is not entitled to immunity, Personal jurisdiction is established whenever subject matter jurisdiction exists and service of process has been made in accordance with section 28 USC §1608. See Olsen v. Government of Mexico, 729 F.2d 641,644 (9th Cir. 1984). Here, Carolan, initiated service with the central authority in London and in accordance with 28 USC §1608. This claim for relief is based on commercial activities and misrepresentation and are not immune from suit. 28 USC §1605(a)(2) and causes of action based on effects in the forum of alleged actions of the defendants serve as a basis for suit under 28 USSC § 1605 (a)(5)(B)..

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[2] An initial complaint as framed by the plaintiff that did not require the court to evaluate any act of state, the common law of foreign nations becomes an issue only when and if it is raised as a defense, this venerable "well-pleaded complaint" rule keeps the court from becoming entangled in state law controversies on conjecture that federal law may come into play at some point during the litigation. See Dole Food v. Patrickson, 251 F.3d 795, (9th Cir. 2001).

Every action against a foreign sovereign necessarily involves application of a body of substantive federal law and accordingly "arises under" federal law. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 497 (1983).

The Ninth circuit has consistently held that no jurisdiction-conferring provision need be specifically pleaded as along as the complaint sets forth facts giving the court Jurisdiction. Love v. USDA, 915 F.2d 1242, 1249 (9th Cir. 1990).

FSIA is the sole basis of obtaining jurisdiction over a foreign state in Federal Court. Argentine Republic v. Amerada Hess Shipping., 488 U.S. 428, 439, 109 S. Ct. 683, 691, 102 L. Ed. 2d 818, 831, (1989.)

The FSIA "must be applied by the district courts in every action against a foreign sovereign, since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity. Argentine Republic v. Amerada Hess Shipping., 488 U.S. 428, 439, 109 S. Ct. 683, 691, 102 L. Ed. 2d 818, 831, (USSC 1989.)

This pre-emption requirement of FSIA over claims based in diversity is stated strongly enough to clearly require the court to conduct the jurisdiction analysis under FRCP 4(k)(2). This pre-emption requirement is distinguishable from circuit holdings that there is no federal question jurisdiction when a complaint on its face states alternative theories supporting a state law claim, at least one of which does not involve a federal question. Long v. Bando Mfg. Of America, Inc., 201 F.3d 754, 759 (6th Cir. 200).

Here, where jurisdiction was originally premised on state law in both the diversity action in the Federal Court and in the original complaint filed in Washington

State Court, the Ninth Circuit failed to address jurisdiction under the nationwide analysis of FRCP 4(k)(2), when the defendants clearly indicated that they are an instrument of a foreign sovereign.

The setting aside of the diversity jurisdiction analysis which only examines the defendants' contacts with one state and the mandatory application of FRCP 4(k)(2) and the nationwide contact analysis required under a federal question is further indicated by the 1993 advisory committee notes to FRCP 4(k)(2): " It does not establish personal jurisdiction if the only claims are those arising under state law or the law of another country, even though there might be diversity or alienage subject matter jurisdiction as to such claims." (1993 Advisory notes to FRCP 4(k)(2), bold and underline added.) Clearly the drafters of the rule intended that when state law claims under Diversity Jurisdiction or other jurisdiction were mixed with jurisdiction under a federal claim such as FSIA here, that the jurisdiction contacts would be with the nation as a whole not with an individual state.

If more than one method of asserting personal jurisdiction are present in a case and Rule 4(k)(2) serves as an alternative basis, the courts have determined the constitutionality of the exercise of jurisdiction under the state long arm statute without eliminating the possible use of 4(k)(2) if the contacts with the state are insufficient. See: Central States Pension Fund v. Reimer Express World Corp., 230 F.3d 934,942 (7th Cir. 2000);

Despite the court directly conducting the jurisdictional analysis for diversity jurisdiction and hypothetically for federal question jurisdiction, this case meets the first requirement of the First Circuits prima

facie case for use of Rule 4 (k)(2) that the claim arises under federal law.

ii. **The second requirement of meeting the prima facie case for burden shifting is the "Negation Requirement":**

Carolan has established and the Ninth Circuit has noticed that the Defendants are not subject to personal jurisdiction in one state, California. Plaintiff attempts at asserting personal jurisdiction in Washington State Court and the Western District of Washington based on Diversity Jurisdiction have not been successful to date.

Although Carolan attempts to assert jurisdiction under alternative legal theories based on 28 USC § 1330 jurisdiction and state law causes of action, this should be expected since initial discovery has not been allowed and the basis of subject matter jurisdiction has not been directly addressed by the court. Petitioner has made a prima facie case for negation.

iii. **Plaintiff met the third prima facie requirement use of Rule 4(k)(2) since he alleged that the defendants have contacts with the nation as a whole to satisfy due process.**

The Ninth circuit has accepted Carolan's factual allegations as true. (Memo., Ninth Circuit, August 16,2004 page 3, App., infra Page at page XX). Carolan has pled FSIA as an alternative legal basis of jurisdiction under 4(k)(2) factually asserting that the defendants have sufficient nationwide contacts.

In jurisdictional discovery Carolan requested further agency agreements of the Universities as those they maintain in California and Washington State and other information such as composition of customer base

from the U.S. Market. Discovery was not allowed to proceed.

Carolan cited nationwide jurisdictional contacts including relevant contacts based on education agency agreements, internet web site accessible to U.S. residents, advertising at U.S. universities, listing in publications that knowingly circulate worldwide, promotional materials (video) formatted in American format, and contracting with other U.S. residents.

Under the First Circuit standard for burden shifting, Carolan has met the prima facie case requirements and the defendants would now have to indicate which State court they are subject to suit in or the court would assert jurisdiction under 4(k)(2) subject to nationwide due process analysis.

3. Evaluation under 7th circuit burden shifting.

In the Petitioner's case, federal question jurisdiction is raised and the Court has noticed that the Defendants are not subject to personal jurisdiction in California. The Defendants now contest plaintiff's attempt to assert jurisdiction in Washington state. Plaintiff has raised the issue of Rule 4(k)(2) to assert jurisdiction and has indicated in the pleading that defendants have nationwide contacts. (See Motion of opposition to dismissal and Opening Brief of Appellant August 25,2003, Case#03-35578: pages 14-16,)

Under the 7th Circuit burden shifting approach to 4(k)(2), if defendants want to preclude the use of 4(k)(2) by the court to assert jurisdiction over them, the defendants only have to name some other state in which the suit could proceed. ISI International, Inc., v. Borden Ladner Gervais LLP., 256 F.3d 548, 552 (7th Cir. 2001).

If defendants fail to name a state forum, then the court would proceed to the due process analysis based on nationwide contacts. Id.

This is precisely the petitioner's case before the court now. Under Rule 4(k)(2) as applied by the Seventh Circuit, the burden would have shifted to the Universities to either name a state in which they can be sued or their contacts would be evaluated on a nationwide basis.

B. The Ninth Circuit further erred in not reversing the Lower court's determination of FNC.

The Western District of Washington stated in a footnote on dismissal that Amendment for FSIA jurisdiction was unnecessary since the Court would decline to exercise jurisdiction on the basis of forum non conveniens. (Dismissal WD WA, June 9th, 2003, P7, FN3, App., infra page XIII.).

The issue of venue transfer and Forum Non-conveniens was raised and briefed in the court of appeals. The Ninth Circuit's memorandum of affirmation did not address the forum non-coneveniens issue. In the event of a successful grant of petition that and vacating of the decision and remand back to the Ninth Circuit, the forum non-conveniens decision could still serve as a barrier to asserting jurisdiction.

In the interest of avoiding the necessity of petitioning this court again, Petitioner requests that the court reverse the District Court's decision as to forum non-conveniens. This venue decision is clearly in conflict with Supreme Court rulings. Petitioner requests that although the court of appeals did not address the issue of forum non-conveniens, that the issue be specifically vacated on remand for proper determination.

i. The venue consideration was premised on hypothetical jurisdiction and the jurisdiction analysis for diversity jurisdiction differs from the federal question analysis under Rule 4(k)(2).

The personal jurisdiction inquiry in federal question cases differs from the inquiry in diversity cases. United States v. Swiss American Bank, Ltd., 274 F.3d 610,618, (1st Cir. 2001). Hence the available contacts for review in determining a venue decision in hypothetical federal question jurisdiction would differ from the information available for a similar decision based in reality on diversity jurisdiction or reality on federal question jurisdiction.

Generally, subject matter jurisdiction is fundamentally preliminary to both the issues of personal jurisdiction and venue and the issue of venue should not be decided prior to a determination that the court has subject matter jurisdiction over the action. See Leroy v. Great Western United Corp., 443 U.S. 173, 180 61 L. Ed. 464, 99 S. Ct. 2710 (1979).

The importance of determining the proper basis of subject matter jurisdiction is further present since the validity of a order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties. Insurance Corp. of Ireland v. Compagnie Des Bauxites de Guinee., 456 U.S. 694, 702; 72 L.Ed. 2d 492, 301;102 S. Ct. 2099, 2104 (1982).

ii. The Forum non-conveniens decision in a footnote, based on hypothetical jurisidiction, fails to comply with U.S. Supreme Court Guidelines in regards to balancing relevant factors.

The district court stated in a footnote that they would decline to exercise jurisdiction on the basis of forum non-conveniens. (Dismissal WD WA, June 9th, 2003, P7, FN3, App., infra page XIII.).

The order did not consider and balance all of the relevant public and private interest factors. The district court in fact failed to balance the relevant factors there is no such basis or grounds for the court's decision discernable from the record and this constitutes an abuse of discretion.

Whether an action may be dismissed for forum non-conveniens is governed by the factors outlined in Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-509, (1947), each of which must be weighed by the court. The court examines the burden on the defendant in light of the corresponding burden on the plaintiff. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-509, (1947),

The district court failed to balance the factors of forum non-conveniens. The district failed to require the defendants to establish that they could be personally sued in an alternative forum. The defendants failed to establish that there is an alternative forum where they could be sued personally and the existence of an alternative forum was in dispute.

When an alternative forum does not permit litigation of the subject matter of the dispute, the alternative forum may be inadequate. Piper Aircraft Co., v. Reno, 454 U.S. 235,254 (1981). The defendants provide no evidence of an alternate forum for the plaintiff, in terms of the Cause of action, ADR program, or forum for a pro se plaintiff.[3] Defendants introduced

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[3] Plaintiff requested in opposition that any dismissal or "transfer" for venue reasons should be conditioned on the

affidavits and other evidentiary materials indicating that an action of this type might be brought, not could be brought, in the high court in Britain, there is no equivalent of an in pro per (non-represented) type suit in the high court, pro bono legal services are not available for the plaintiff, and that the Visitorial Jurisdiction does not embrace contractual matters per se, only issues of natural justice and adherence to internal procedures and guidelines.

There is dispute as to these issues between the Plaintiff and the Defendant's and which should be resolved at an evidentiary hearing not through hypothetical jurisdiction. The plaintiff established that the UK offers no forum for his cause of action either in the High Court since there is no equivalent there to our pro se action, and that the bar pro bono organization was unable to assist with this case. These matters are in dispute.

Defendants claim that they are amenable to service in Wales. This is clearly untrue. The docket record in both the Northern District of California and the Western District of Washington indicates that the plaintiff initiated service in compliance with the Hague convention through the UK central authority. Plaintiff was able to obtain service upon Cardiff University but has not been able to obtain service upon the University of Wales.

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signing of affidavits by the Defendants that they would not: 1. Bar this action in any venue for expiration of any statute of limitations. 2. Be un-amenable to this cause of action in any venue. 3. raise any claim of Sovereign immunity. 4. ensure that the forum allows in pro per actions. Defendants failed to do this.

This fact is significant not only fact that the Defendants' statements as to an alternative forum are blatantly untrue, but highlight the travesty that the District court has promoted in allowing the Defendants to claim for costs while at the same time protecting the Defendants from the enforcement of any judgment that the plaintiff will ultimately win when the case goes to trial.

The Court of appeals should not have upheld the forum non-conveniens determination of the Western District Washington. This venue decision is in clear conflict with Supreme court case law and was also premised on hypothetical jurisdiction. The decision should be vacated and remanded.

6. Conclusion.

Petitioner requests the court vacate the Ninth Circuit's dismissal of this case for lack of personal jurisdiction and remand the case to the Ninth Circuit for proper application of the Rule 4(k)(2) under a burden shifting analysis.

Dated This 2nd day of March, 2005

Michael James Carolan
Petitioner Pro Se
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Judges Below:

Western District of Washington(Seattle): Honorable Thomas S. Zilly, Case Number C03-0149Z and 03-5157Z(removed action from state court consolidated with C03-0149Z.)

Western District of Washington (Tacoma): Honorable Franklin D. Burgess (03-5157 Action removed from state court.)

Ninth Circuit Court of Appeals:
Case Numbers 03-35578, 03-35813, 03-35819
"Before Schroeder, Chief Judge, Rawlinson and Callahan, Circuit Judges."

Procedural Summary from Petitioners opening brief (Opening Brief of Appellant, Michael Carolan, Case #03-35819, March 17, 2004, Pages 10-12.)

"F. STATEMENT OF THE CASE: Procedural summary: This appeal concerns District Court Case C03-0149Z, (Western District of Washington). Case C03-0149Z was filed as an individual suit in the Western District of Washington, on January 28th, 2003. A related case C03-5157Z was originally filed as a class action as State Case number "03 2 04389 9" in the Superior Court of Washington for Pierce County on January 29, 2003 seeking an unspecified amount of damages.

The Defendants removed case C03-5157Z from State court to the Western District of Washington (Tacoma) on March 20th/21st, 2003. Removing the suit on the basis of diversity jurisdiction 28 U.S.C. § 1332 and the removal statute 28 U.S.C. §1441, the Defendants declared that the individual class damages sought were reasonably in excess of $75,000 per individual. (Notice of removal, C03-5157 FDB, March 20th, 2003, page 2 lines 18-26.).

On March 20th, 2003, the Honorable Franklin D. Burgess, of the Western District of Washington, issued a minute order determining that class action suit removed from State Court was directly related to the individual suit case number C03-0149Z and designated the removed case as C03-5157 to the Honorable Judge Thomas S. Zilly. On March 24th, the Defendants filed a Notice of Appearance.

After removal of the related case 03-5157, the Defendants sought to avoid complying with Fed.R.Civ.P 81(c) which required answering the complaint within five

days of removal. Defendants, (Defn. motion for enlargement of time, March 27th, 2003, Page 4 lines 1-2) requested sixty days to answer both complaints. The Defendants invoked 28 U.S.C. §1610(d), indicating that they were a instrumentality of a foreign state (Defn. reply in support of Motion for enlargement of time, April 9th, 2003 page 4, lines 1-4). Defendants stated that they were a "foreign government affiliated entity" (Defn. motion for enlargement of time, March 27th, 2003, Page 4 lines 11-14).

The motion for extension of time to answer the complaint was granted and the Defendants then filed a FRCP 12(b) motion for dismissal. Plaintiff filed a motion of opposition and requested a stay of the dismissal.

Plaintiff filed initial discovery requests related to jurisdiction. Defendants have not answered the discovery requests. Without oral argument, the holding of any hearing or allowing evidentiary issues in dispute to be resolved, a dismissal order was issued on June 9th, 2003 by the Honorable Thomas S. Zilly. The order did not address FRCP 4(K)(2) jurisdiction.[1] Defendants filed a

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[1] SER 68: The order stated in conclusion " *The Universities do not have sufficient contacts for the exercise of jurisdiction to comport with due process. Amendment of the complaint would be futile because the Universities must have sufficient contacts under the FSIA as well. Additional discovery on jurisdiction is not necessary because the FSIA does not provide a basis for jurisdiction in the case. For these reasons, the Universities' motion to dismiss Case No C03-149z and No. C03-5157(FDB)Z are GRANTED Carolan's request for leave to amend and for a stay of the dismissal are DENIED*".

motion for costs (dated June 27, 2003 SER 26) for $20,080.06. Including $19,170.00 for attorney fees sought under Washington State Statute, RCW 4.28.185(5). The defendants also stated that they had approximately $10,000 dollars in other fees that they were not claiming for (SER 31), it is assumed that those fees will be asked for at a later time if the plaintiff seeks a hearing or due process of law.

Plaintiff filed a notice of appeal with this court dated June 30th, 2003. Previously, in 2001, a similar complaint (breach of contract, misrepresentation, fraud), was filed in the Northern District of California, Case No. C-01 03330 MMC ARB. That complaint was dismissed on an ex parte motion for lack of personal jurisdiction without any hearing or due process."

Stamp from Defendants' filing of proposed order: "Filed Jun 09 2003, At Seattle, Clerk, U.S. District Court, Western District Washington". **Stamp from Courts' filing**: Jul 01 2003 MR, At Seattle, Clerk U.S. District Court, Western District of Washington"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHAEL J. CAROLAN
PLAINTIFF,

v.

CARDIFF UNIVERSITY,
AND THE
UNIVERSITY OF WALES,
DEFENDANT

No C03-149Z .

MICHAEL J. CAROLAN
PLAINTIFF,

v.

CARDIFF UNIVERSITY,
AND THE
UNIVERSITY OF WALES,
DEFENDANT

No C03-5157(FDB)Z .

ORDER

This matter came before the Court on a motion to dismiss by Defendants Cardiff University and the University of Wales ("the Universities"), docket no 8. This order also addresses Plaintiff Michael J. Carolan's ("Carolan") request for leave to amend the complaint to include the Foreign Sovereign Immunities Act as an alternative ground for jurisdiction and his request of a stay of dismissal, docket no. 26, C03-5157(FDB)Z.

A. Factual Background

In 1996, after accessing the Universities' website, Carolan requested information from Cardiff University about its LL.M program on "Legal Aspects of Marine Affairs." Complaint p.8, docket no.1. This information was sent to a Washington address maintained (*2)by Carolan while he was employed as a merchant seaman Id at 9. Carolan applied for, and was offered, admission to the program in May, 1997 Id. Although he was a California resident at the time, in his application Carolan provided a Tacoma address as his permanent address Ex B to Decl.of Phillip M.Guess, p11,docket no.11;Ex.C to Decl of Louise Casella, docket no.10("decl of Casella"). Carolan asserts that he was in Washington when he paid the initial tuition fee via credit card. (FN1 In the earlier California action, Carolan claimed he was in California Ex B to Decl of Guess,p.12). Upon beginning his studies at Cardiff in September 1997, Carolan listed a Cardiff address as his permanent home address on his enrollment papers.

In June 1998, after failing several exams, Carolan filed an academic appeal with the Universities. Through the appeal, the Universities offered to refund a significant portion of Carolan's tuition. Decl. of Carolan ¶21, docket

no.15. Carolan refused the offer, instead opting to file a lawsuit.

B. **Procedural Background**

In September 2001, Carolan filed suit against the Universities in district court for the Northern District of California. Ex A to decl of Guess, docket no.11("decl of Guess"). As he does here, Carolan alleged two causes of action, "misrepresentation and breach of contract,"and "breach of good faith performance of a special relationship quasi-fiduciary or insurance type contract." Carolan v. Cardiff Univ., 2002 WL 73228, (N.D. Cal,Jan.8,2002). The court dismissed the suit for lack of personal jurisdiction. Id.

In 2003, Carolan filed a class action in Washington Superior Court for Pierce County on the same facts. This action was removed by the Universities to district court in Tacoma. Subsequently, Carolan filed an individual action in this court. In the Tacoma suit, the Honorable Franklin D Burgess determined that the case was directly related to the case filed in this Court and reassigned the action to this Court. Case No. C03-1517FDB, Order, docket (*3) no 3. The class action and the individual suit are otherwise identical. Both are before this Court and this order relates to both.

DISCUSSION

A. **Standard**

To defeat a motion to dismiss for lack of personal jurisdiction, the plaintiff must make a prima facie showing that jurisdiction exists. AT&T v Compagnie Bruxelles Lambert, 94 F.3d 586,588 (9th Cir.1996). Conflicts between the parties' affidavits must be resolved in the plaintiff's favor. Id.

B. General Jurisdiction

General jurisdiction exists when a "nonresident defendant's activities within a state are 'substantial' or 'continuous and systematic.'" Data Disc, Inc. v. Sys. Tech. Assocs, Inc, 557 F2d 1280, 1287 (9th Cir. 1977). This is a high standard, requiring contacts that "approximate physical presence." Bancroft & Masters, Inc. v. Augusta Nat'l, Inc, 223 F.3d 1082, 1086 (9th Cir. 2000). Such contacts give rise to personal jurisdiction over the defendant, even when the cause of action is unrelated to the defendant's contacts with the state. Data Disc, Inc., 557 F.2d at 1287.

The Universities argue that their contacts with Washington are insufficient to support general jurisdiction. The Universities contacts are: a non-interactive informational website student exchange program between Cardiff University's Welsh School of Pharmacy and Washington State University, and information mailed to addresses in the state upon request. Decl of Casella, ¶¶4,5.

Carolan argues that the Universities' contacts are sufficient for general jurisdiction. He labels these contacts as "a significant presence in an economic 'education market'" that includes Washington state.

Carolan fails to present a prima facie basis for the exercise of general jurisdiction over the Universities. The Universities' non-interactive websites are insufficient to support (*4) general jurisdiction. Carolan v. Cardiff Univ.,2002 WL 73228 at *3 (N.D. Cal.Jan.8, 2002),Calloway Golf Corp. v. Royal Canadian Golf Ass'n, 125 F.Supp.2d 1194,1203 (C.D. Cal 2000) ("A passive website that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction").

Similarly, student exchange programs have been held to "fall far short of establishing general jurisdiction." Park v. Oxford Univ., 35 F.Supp 2d 1165, 1167-1168 (N.D. Cal 1997) aff'd 165 F.3d 917 (9th Cir.1998).

The act of mailing information to a Washington address pursuant to a request does not "approximate physical presence," and is not a "continuous and systematic" contact to support general jurisdiction. Bancroft, 223 F.3d at 1086; Data Disc, 557 F.2d at 1287. The Universities contacts do not, therefore, suffice for general jurisdiction.

C. Specific Jurisdiction

If a defendant's contacts in a state are insufficient to support general jurisdiction, the state may exercise jurisdiction over the defendant only for claims that arise out of the defendant's forum contacts. Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 444-445 (1952). The exercise of specific jurisdiction must comport with the forum state's long-arm statute and with due process. Omeluk v. Langsten Slip & Batbyggen A/S, 52 F.3d 267,269 (9th Cir. 1995). Washington's long-arm statute confers jurisdiction to the extent permitted by due process. R.C.W.4.28.185; Werner v. Werner, 84 Wash 2d 360,364 (1974). Thus, the jurisdictional inquiries under the state statute and due process can be conducted as one analysis. Fed.Deposit Ins Corp v. British-American Ins. Co., 828 F.2d 1439,1441(9th Cir. 1987).

A three-part test is used to determine whether specific jurisdiction satisfies due process. Ballard v. Savage, 65 F.3d 1495,1498 (9th Cir.1995). First, the plaintiff must demonstrate that the nonresident defendant purposely availed itself of the privilege of conducting activities in the forum. Id. Second, the claim must be one which arises out of the (*5)defendant's forum-related

activities. Id. Third, the exercise of jurisdiction must be reasonable. Id. *All three elements must be satisfied to establish specific jurisdiction.* Omeluk, 52 F.3d at 270.

1. Purposeful Availment

In cases arising out of contractual relationships, including torts related to the contract, merely contracting with a resident of the forum state is insufficient for specific jurisdiction. Travelers Cas.& Sur Co. of Am. v. Telstar Constr. Co.,Inc., No CIV 02-111,2003 U.S. Dist LEXIS 4051,at *40(D.Ariz March 5,2003). Courts must evaluate "prior negotiation and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing." Burger King v. Rudzewicz, 471 U.S.462,479 (1985).

Contacts that are "random," "attenuated" or "fortuitous," do not support jurisdiction. Id. at 480. Ordinarily "use of the mails, telephone, or other international communications simply do not qualify as purposeful activity invoking the benefits and protections of [the forum] state." Peterson v. Kennedy, 771 F.2d 1244,1262 (9th Cir.1985). Moreover, the foreseeability of causing injury in another state is not a sufficient basis for the exercise of jurisdiction. Id. at 474.

Carolan asserts that the act of sending materials to his Washington address, including a form asking him to accept the Universities offer of admission, constitute purposeful availment. Further, he argues that the Universities had continuing obligations to him after he returned to the United States and that the effects of the breach of contract were felt in Washington.

All of Carolan's claims, including his claims for misrepresentation and fraud (FN2:Specifically, Carolan alleges that during a visit to Cardiff University before he enrolled a professor told him that the LL.M course would

be suitable for a person with a non-law background. Affidavit of Carolan, ¶3,C03-5157Z,docket no 27.),arise out of his contract with the Universities. Stanford Ranch,Inc. v. Md Cas., 89 F.3d 618,624 (9th Cir.1996)(intentional misrepresentation to induce defendant to enter contract sounds in (*6)contract rather than tort). Carolan received information from the Universities and signed a form accepting the offer of admission while present in Washington. Ex. 1 to Complaint, docket no 1. He signed another form while in Cardiff titled the "postgraduate student enrollment form" Ex. E to Decl of Casella.

Jurisdiction does not lie simply because Carolan signed one of the forms in Washington, particularly because the substance of the contract was formed and executed in Wales. See McGlinchy v. Shell Chem Co.,845 F.2d 802,816 (9th Cir. 1988) (no jurisdiction even though contract signed in forum).

The contemplated future consequences of the contracts was Carolan's attendance at Cardiff for one year. The foreseeable possibility that he would fail and have to re-sit for the exams in Washington does not support a finding of jurisdiction. See Burger King, 471 U.S. at 474. Any continuing relationship created by the contract is more "attenuated" and "fortuitous," than that at issue in Burger King and does not provide a basis for jurisdiction. 471 U.S. at 480. Because all three elements of the specific jurisdiction analysis must be met to comport with due process, the inquiry ends if the defendant has not purposefully availed. Omeluk, 52 F.3d at 270. It bears noting, however, that the Universities contacts do not satisfy either the "arising out of" or the reasonableness requirements. See Shute v. Carnival Cruise Lines,897 F.2d 377,381 (9th Cir.1990)rev'd on

other grounds,499 U.S. 585 (1991), see also Ballard v. Savage, 65 F.3d 1495,1500 (9th Cir.1995).

D.Foreign Sovereign Immunities Act.

Carolan seeks leave to amend the complaint to include the Foreign Sovereign Immunities Act ("FSIA") 28 U.S.C. § 1602. District courts have original jurisdiction over claims for relief where the foreign defendant is not entitled to immunity under the FSIA. 28 U.S.C. § 1330.

The FSIA restricts sovereign immunity such that it applies to foreign states or their agencies or instrumentalities, for public or sovereign activities, but not for commercial (*7) activities. 28 U.S.C. § 1602. An agency or instrumentality is defined in relevant part as an entity that is "an organ of a foreign state or political subdivision." 28 U.S.C. § 1603(b)(2).

If the Universities are an organ of the United Kingdom, and their activity is commercial, the activity must have "substantial contact with the United States." 28 U.S.C. §1603(e); Schoenberg v. Exportadora de Sal, S A d C.V., 930 F.2d 777,780 99th Cir.1991). The legislative history of the FSIA makes plain that "the requirements of minimum jurisdiction contacts and adequate notice are embodied" in the FSIA. H.R. Rep No 94-1487,13 (1976). Thus, a party "who lost on the question of jurisdiction, could not bring the same case in State court claiming that the Federal court's decision extended only to the question of Federal jurisdiction and not to sovereign immunity." Id.

Amendment of the complaint to include the FSIA would be futile. The Universities do not have sufficient minimum contacts to satisfy due process and jurisdiction would not lie under the FSIA. America West Airlines, Inc. v. GPA Group, Ltd., 877 F.2d 793,801 (9th Cir.

1989) (where amendment would be futile leave to amend need not be granted).

Carolan also moves for a stay of dismissal so that he can conduct additional jurisdictional discovery on the FSIA as a basis for jurisdiction and obtain counsel to aid him in his class action. Dismissal without allowing additional jurisdictional discovery is proper when "it is clear that further discovery would not demonstrate facts sufficient to constitute a basis for jurisdiction." Wells Fargo & Co. v. Wells Fargo Exp. Co., 556 F.2d 406,430 (9th Cir. 1977). As explained above, the FSIA is not "sufficient to constitute a basis for jurisdiction." Id. (FN3: Amendment of the complaint and additional discovery on jurisdiction would also be futile because the Court would decline to exercise jurisdiction based on the doctrine of forum non conveniens. See Lueck v. Sundstrand Corp., 236 F.3d 1137,1142 (9th Cir. 2001).

Conclusion

The Universities do not have sufficient contacts for the exercise of jurisdiction to comport with due process. Amendment of the complaint would be futile because the (*8) Universities must have sufficient contacts under the FSIA as well. Additional discovery on jurisdiction is not necessary because the FSIA does not provide a basis for jurisdiction in this case. For these reasons, the Universities' motion to dismiss Case No C03-149Z and Case No. C03-5157(FDB)Z are GRANTED. Carolan's request for leave to amend and for a stay of the dismissal are DENIED.

IT IS SO ORDERED.
DATED this _____(Written: "9th") day of June ,2003.

S/"Thomas S. Zilly"
THOMAS S. ZILLY
UNITED STATES DISTRICT JUDGE

(Barcode)
03-CV-05157-ORD

Honorable Thomas S. Zilly

Stamp from Defendants' filing of proposed order: "JUN 30 2003 MR, At Seattle, Clerk, U.S. District Court, Western District Washington". **Stamp from Courts' filing**: "SEP 08 2003 At Seattle Clerk U.S. District Court Western District of Washington"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHAEL J. CAROLAN PLAINTIFF, v. CARDIFF UNIVERSITY, AND THE UNIVERSITY OF WALES, DEFENDANT.	Case No. C03-5157(FDB)Z (Check mark above after"Z") Case No. C03-149Z [PROPOSED] (PROPSOSED STRUCK OUT) **ORDER GRANTING DEFENDANTS' MOTION FOR COSTS AND NECESSARY DISBURSEMENTS**

THIS MATTER came before the court on the bill of costs and Motion for Costs and Necessary Disbursements filed by Defendants Cardiff University and the University of Wales (collectively, the "Universities"). Having considered the Motion, the Bill of costs and the Declaration of Phillip M. Guess in

Support of Defendants' Motion to Tax Costs and attached exhibits, all other materials filed in support of or opposition to the motion, and the files and records herein, the Court hereby orders:

Defendant Universities Motions are hereby **GRANTED**.

(*2)Costs and expenses shall be taxed against Plaintiff Michael J. Carolan and awarded to defendants as follows:

Type of Expense	Authority	Cost
Clerks fees	28 U.S.C. § 1920(1)	150.00
Docket Fees	28 U.S.C. § 1923	10.00
Copy Service Fees	28 U.S.C. § 1920(4)	258.66
Internal Copies Required for Service and Filing	28 U.S.C. § 1920(4)	491.40
Attorneys Fees For Preparing and Filing Motion to Dismiss and Associated Papers	RCW 4.28.185(5)	19170.00
Total:		$20,080.06

This s/"7th" day of July(Struck)s/"Sept", 2003

S/"Thomas S. Zilly"
S/"United States District Judge"
Struck: "MAGISTRATE OF THE DISTRICT COURT"

Presented By:
Preston Gates and Ellis LLP

By s/"Phillip M. Guess"

Phillip M.Guess, WSBA #26765
Attorneys for Defendants
CARDIFF UNIVERSITY and
THE UNIVERSITY OF WALES

(Footers pages 1 and 2 LEFT:
"ORDER GRANTING DEFENDANTS' MOTION FOR COSTS AND NECESSARY DISBURSEMENTS[PROPOSED]-(page #)"
(Footer RIGHT:
"PRESTON GATES & ELLIS LLP, 925 FOURTH AVENUE, SUITE 2900, SEATTLE WASHINGTON 98104-1158, TELEPHONE (206)623-7580, FACSIMILE (206) 623-7022."

Stamp: "FILED AUG 16 2004 CATHY A. CATTERSON, CLERK, U.S. COURT OF APPEALS"

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL J. CAROLAN Plaintiff-Appellant, v. CARDIFF UNIVERSITY; et al., Defendants-Appellees	Nos. 03-35578 03-35813 03-35819 D.C. Nos. CV-03-00149-TSZ CV-03-05157-TSZ MEMORANDUM*

Appeal from the United States District Court for the Western District of Washington, Thomas S. Zilly, District Judge, Presiding

Submitted August 9, 2004**

Before: SCHROEDER, Chief Judge, RAWLINSON and CALLAHAN, Circuit Judges.

In Appeal No. 03-35578, Michael J. Carolan appeals pro se the district

[*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3. ** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed.R.App.P.34(a)(2).]

(*2) court's judgment dismissing his actions against defendants for lack of personal jurisdiction. In Appeal Nos. 03-35813 and 03-35819, Carolan appeals the district court's orders granting defendants' motion for costs and attorneys' fees. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo the district court's dismissal for lack of jurisdcition, see *Myers v. Bennett law offices*, 238 F.3d 1068,1071 (9th Cir.2001), and the legal question of whether the district court had authority to grant costs and attorneys' fees, *see United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963,968 (9th Cir.1999). We review for abuse of discretion the district court's denial of discovery. *See Butcher's Union Local No.498 v. SDC Invest., Inc.,* 788 F.2d 535,540 (9th Cir.1986). We affirm.

For a court to exercise personal jurisdiction over a nonresident defendant, that defendant must have "minimum contacts" with the forum state such that an exercise of jurisdiction "does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310,316 (1945) (internal quotation marks and citations omitted). Because Wash.Rev.Code § 4.28.185 is coextensive with federal due process requirements, the jurisdictional analyses under state and federal law are the same. *See Chan v. Soc'y Expeditions*, 39 F.3d 1398,1405 (9th Cir.1994).

The district court properly concluded that it lacked general personal (*3) jurisdiction over defendants

because defendants do not have continuous and systematic general business contacts with Washington state. *See Bancroft & Masters, Inc. v. Augusta Nat'l*, 223 F.3d 1082,1086 (9th Cir. 2000).

The district court properly concluded that it lacked specific personal jurisdiction over defendants because defendants did not purposefully avail themselves of the benefits and protections of Washington state law. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462,475 (1985).

The fact that Carolan accepted defendants' offer of admission while in Washington is not enough to establish purposeful availment. *See id.* at 478-79.

We need not consider whether the commercial activities exception to the Foreign Sovereign Immunities Act ("FSIA") applies to defendants because an exercise of jurisdiction under FSIA must still comport with due process. *See Davies & Co. v. Republic of Marshall Islands*, 174 F.3d 969, 972-73 (9th Cir.1999).

The district court did not abuse its discretion in granting the motion to dismiss without permitting discovery where the district court accepted all of Carolan's factual allegations as true and Carolan has not shown that the denial of discovery resulted in any prejudice. *See Butcher's Union Local No.498,* 788 F.2d 540. The district court was within its discretion to dispense with oral argument, (*4) *see Carpinteria Valley Farms v. County of Santa Barbara,* 344 F.3d 822,832 n.6 (9th Cir.2003), and did not violate Carolan's Seventh Amendment right to a jury trial by dismissing his action, *cf. Etalook v. Exxon Pipeline Co.*, 831 F.2d 1440, 1447 (9th Cir. 1987)(holding that there is no right to a jury trial where there is no genuine issue of material fact for a jury to resolve).

Finally, the district court had authority to grant attorney's fees to defendants pursuant to Wash.Rev.Code 4.28.185(5), as defendants prevailed on jurisdictional grounds. See Scott Fetzer Co. V. Weeks, 786 P.2d 265,266 (Wash.1990).

In Appeal No.03-35578, we grant Carolan's motion to file a supplemental brief, but deny his motion to expedite as moot.

Appeal No. 03-35578 **AFFIRMED**.
Appeal No. 03-35813 **AFFIRMED**.
Appeal No. 03-35819 **AFFIRMED**.

(No signatures)

Stamp: "FILED DEC 03 2004 CATHY A. CATTERSON, CLERK, U.S. COURT OF APPEALS"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL J. CAROLAN Plaintiff-Appellant, v. CARDIFF UNIVERSITY; et al., Defendants-Appellees	Nos. 03-35578 03-35813 03-35819 D.C. Nos. CV-03-00149-TSZ CV-03-05157-TSZ **ORDER**

Before: SCHROEDER, Chief Judge, RAWLINSON and CALLAHAN, Circuit Judges.

The Panel has voted to deny appellant's petition for panel rehearing. Judges Schroeder,Rawlinson, and Callahan, have voted to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed.R.App.P.35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

No further filings will be accepted in this closed appeal.

(No signatures.)